No. 85-2079

In The

Supreme Court of the United States

October Term, 1986

LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, *et al.*,

Petitioners,

v.

ADVANCED LIGHTWEIGHT CONCRETE CO., INC.,

Respondent.

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Whether a claim that an employer has failed to contribute to a multiemployer trust fund for periods after the expiration of a collective bargaining agreement, in alleged violation of the employer's duty to maintain the status quo under Section 8(a)(5) of the National Labor Relations Act, is actionable under Section 515 of the Employee Retirement Income Security Act, despite the exclusive jurisdiction of the National Labor Relations Board over alleged violations of the NLRA.

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STATEMENT OF THE CASE

Petitioners, hereinafter referred to as "the Funds," are multiemployer employee benefit plans established pursuant to Section 302(c)(5) of the Labor Management Relations Act of 1947, as amended, (LMRA) 29 U.S.C. 156 et seq. Prior to June 15, 1983, Respondent, hereinafter referred to as "the Employer" or "Advanced Lightweight", made contributions to the Funds pursuant to collective bargaining agreements it had with the District Council of Plasterers and Cement Masons of Northern California and the Northern California District Council of Laborers, hereinafter referred to as "Unions". These agreements incorporated the terms of the Funds' trust agreements by reference and specified a contribution rate to be paid monthly by the Employer during the term of the agreement. The Employer made all required contributions to the Funds through June 15, 1983, when the collective bargaining agreements expired.

On April 1, 1983, the Employer advised both Unions that it would not be bound by any extensions or renewals of the 1980-83 agreement and declared its readiness to negotiate. Notwithstanding this invitation, neither Union made any attempt to commence collective bargaining negotiations with the Employer. At no time since June 15, 1983, has Advanced Lightweight been party to a collective bargaining agreement with either Union.[1]

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[1] The manner and extent to which the two Unions availed themselves of Advanced Lightweight's bargaining invitation is in dispute. The Funds claim that no bargaining impasse was reached between Advanced Lightweight and the two Unions. Advanced Lightweight, on the other hand, asserts the existence of a bargaining impasse. Alternatively, even in the absence of a bargaining impasse, Advanced Lightweight contends that the

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On December 16, 1983, the Funds filed separate suits against the Employer seeking delinquent trust fund contributions alleged to be due for the period following the agreements' expiration. In both actions, the Funds alleged that the Employer was bound under Section 8(a)(5) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(5), to continue contributions after June 15, 1983 and that the actions arose under and were brought pursuant to Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. 185 and Section 502 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1132.

In January 1984, the Employer answered the Funds' Complaints and alleged that the district court lacked subject matter jurisdiction over the Funds' claims. It also asserted that its negotiations with the Unions were at "impasse" and that it therefore had no contribution obligation.

Advanced Lightweight then moved for summary judgment on two principal grounds: first, that neither LMRA Section 301 nor ERISA Section 515 requires employers to comply with their legal obligations based on Section 8(a)(5) of the NLRA, 29 U.S.C. 158(a)(5); and second, that

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Unions either did not assert their bargaining rights in a timely fashion and thereby waived them, or failed to satisfy their obligation to bargain in good faith with Advanced Lightweight with respect to wages, hours and other terms and conditions of employment. Advanced Lightweight contends that in either event it satisfied its duty to bargain under Section 8(a)(5) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(5), and that it was free to make unilateral changes in working conditions, i.e., the cessation of contributions to the Funds after the expiration of the Unions' contracts.

the Funds' cause of action falls within the exclusive jurisdiction of the National Labor Relations Board (NLRB). The district court granted Advanced Lightweight's motion for summary judgment.

The Ninth Circuit Court of Appeals affirmed on the ground that the district court had no jurisdiction to hear actions based on Section 8(a)(5) of the NLRA under either Section 301 of the LMRA or any section of ERISA. It noted that "an employer's failure to honor the terms and conditions of an expired collective bargaining agreement pending negotiations on a new agreement constitutes bad faith bargaining in breach of sections 8(a)(1), 8(a)(5) and 8(d) of the [NLRA]." But, it added, "a collective bargaining agreement does not 'survive' [its expiration] in the sense that it continues as a legally operative document." Rather, the court said, "the agreement's terms 'survive' in order to define the parameters of the employer's obligation under section 8(a)(5) to maintain the status quo during negotiations." Accordingly, the court found that Advanced Lightweight was entitled to "summary judgment on the Funds' section 301 claims."

Turning to the question of the district court's jurisdiction under ERISA Sections 502 and 515,[2] the court found "no persuasive evidence in either the plain words or legis-

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[2] Section 502(e)(1), 29 U.S.C. 1132(e)(1), provides: "[T]he district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary."

Section 515 of ERISA, 29 U.S.C. 1145, provides that:

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under

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lative history of ERISA * * * that Congress intended section 515 to be an exception to the general rule of NLRB preemption." Accordingly, the court held that "the primary jurisdiction of the [NLRB] preempts the Trust Funds' * * * suit in district court under sections 502 and 515 of [ERISA] to recover delinquent contributions accrued after a collective bargaining agreement has expired."

In June 1986, the Funds petitioned this Court for a writ of certiorari to determine whether district courts had jurisdiction, pursuant to Sections 502 and 515 of ERISA, over actions to collect trust fund contributions which allegedly accrued after the collective bargaining agreement which created the obligation to contribute expired.[3] Thereafter, the Court invited the Solicitor General to comment on whether certiorari should be granted. The Solicitor General recommended that certiorari be granted even though every court of appeal that has considered this issue has joined with the Ninth Circuit. On February 23, 1987, this Court granted the Petition For Writ of Certiorari.

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the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

[3] The Trust Funds did not seek review of the Ninth Circuit's decision concerning Section 301 jurisdiction. Accordingly, the Section 301 portion of the underlying decision is not before the Court.

SUMMARY OF ARGUMENT

A. 1. The plain wording of the 1980 amendments to ERISA establishes that an employer violates ERISA only when it fails to make contributions to a multiemployer plan under an existing collective bargaining agreement. Section 515 does not provide that an employer violates ERISA when it ceases making contributions after a collective bargaining agreement expires. Those claims fall solely within the exclusive jurisdiction of the National Labor Relations Board under Section 8(a)(5) of the NLRA. If Section 515 were intended to apply to post-contract obligations that may arise by operation of applicable labor-management relations law, it would say so. It does not. Instead, Section 515 merely allows a plan to seek past due contributions and other statutorily-defined damages when an employer breaches its contract.

Other sections of the Multiemployer Pension Plan Amendments Act of 1980, Pub.L. No. 96-364, 94 Stat. 1295 (MPPAA), demonstrate that Congress understood the difference between contractual obligations and duties arising by operation of the NLRA and that it chose to limit the application of Section 515 to the former. Where Congress includes language in one section of a statute but omits it in another section of the same act, it must be presumed that it acted intentionally and purposefully. Common sense and generally accepted principles of statutory construction also require a conclusion that Section 515 was not intended to apply to claims for post-contractual contributions in derogation of the NLRB's exclusive jurisdiction over such claims.

2. Every reference to Section 515 in the legislative history of the 1980 amendments to ERISA speaks in

terms of the employer's contractual obligation to contribute and makes clear that Congress enacted Section 515 for the limited purpose of giving multiemployer plans additional remedies for an employer's breach of that obligation. Nowhere did Congress indicate an intent to invade or encroach upon the NLRB's exclusive jurisdiction over unfair labor practices.

The Funds' claims are grounded solely upon the NLRB's interpretation of Sections 8(a)(5) and 8(d) of the NLRA. Like ERISA, the NLRA is a complex, reticulated statute which gives the NLRB exclusive jurisdiction over unfair labor practices. If Congress had intended to alter this comprehensive scheme, or to erode the Board's exclusive power when it amended ERISA, Congress would have said so. However, it is clear from the legislative history that no such changes or restrictions were intended or even contemplated. Instead, Congress crafted ERISA remedies to apply only to collection actions based upon an employer's breach of its contractual promise to pay.

B. Requiring trust funds to go before the NLRB with claims that arise by operation of the NLRA will neither harm plans nor cause trustees to breach their fiduciary duties. Trust funds are like any other charging party whose claims derive solely from Section 8(a)(5) of the NLRA. They may bring a charge for unfair labor practices and may seek appropriate remedies under the NLRA. A iolation of Section 8(a)(5) is a violation of the NLRA and does not entitle funds to the mandatory relief of Section 502 of ERISA. However, the NLRB does have broad remedial powers, and can award appropriate relief, including lost return on investment, administrative costs, liquidated damages and attorney's fees, where the trust funds prevail on their unfair labor practice claims. Trust

funds will not be liable for benefits unsupported by contributions, and trustees will not breach their fiduciary duties if they pursue post-contractual contributions before the NLRB. Rather, they will have done all that the law allows them to do, thereby satisfying their duties as fiduciaries.

C. Any claim for post-contractual contributions is grounded solely upon the employer's duty arising out of the NLRA, as interpreted and applied by the NLRB. It is essential to the continued uniform interpretation and application of federal labor policy that the NLRB, and not the courts, resolve unfair labor practice claims. The preservation of the NLRB's exclusive jurisdiction is especially important here because difficult issues of fact and complex questions of federal labor law are presented. These issues, at least one of which is a federal labor policy question of first impression, require initial Board determination.

ERISA's withdrawal liability sections do not alter this result. Delinquency claims based on Section 8(a)(5) of the NLRA are not analogous to withdrawal liability arising under Section 4302 of ERISA, and allowing district courts to decide unfair labor practices in delinquency actions represents a needless invasion of the NLRB's exclusive jurisdiction. A determination that an employer has withdrawn does not involve a violation of Section 8(a)(5) of the NLRA or authorize an invasion of the NLRB's duty to decide unfair labor practices.

Allowing district courts to hear collection claims based on Section 8(a)(5) will also frustrate the policies and purposes underlying ERISA. Section 515 was added to give trust funds an ERISA-based breach of contract cause of

action where an employer would not be allowed to raise defenses unrelated to its promise to pay. If federal courts hear actions based on unfair labor practices under Section 8(a)(5), all those complex, "extraneous" defenses will be reinjected into collection actions and the purpose of Sections 515 and 502 will be frustrated. Sending Section 8(a)(5) claims to district court will also frustrate ERISA by causing plans to needlessly expend plan assets on complex judicial litigation of uncertain claims. The NLRB is ready and able to efficiently prosecute these claims for free. Thus, allowing trust funds to proceed to court with unfair labor practices may needlessly reduce assets which could otherwise be used to pay benefits.

ARGUMENT

A. The Plain Wording Of The 1980 Amendments To ERISA Establishes That An Employer Violates Section 515 Of ERISA Only When It Fails To Make Contributions To A Multiemployer Plan Under An Existing Collective Bargaining Agreement.

1. Section 515 Of ERISA Means Exactly What It Says—It Is Limited To Claims Arising Out Of Existing Contracts And Does Not Apply To Obligations Arising Solely Under Section 8(a)(5) Of The NLRA.

Before Section 515 was added to Title I of ERISA in 1980, there was no cause of action under ERISA for delinquent contributions. A multiemployer employee benefit fund that wished to sue an employer for delinquent contributions had only one route to federal court—Section 301 of the Labor Management Relations Act, 29 U.S.C. 185. Under that section, the fund would not be entitled to recover attorney fees or any penalties and would not automatically be entitled to recover prejudgment interest.

In 1980, Congress decided to arm multiemployer plans with an extraordinary weapon in collection actions—mandatory prejudgment interest, mandatory attorney fees and costs, and a mandatory penalty equal to the prejudgment interest (or, if greater, any liquidated damages specified in the plan document, up to 20 percent of the delinquency). These extraordinary remedies were inserted in Section 502(g) of ERISA.

The addition of mandatory remedies to Section 502 still did not authorize a multiemployer fund to sue an employer for delinquent contributions. Accordingly, Congress added Section 515 to make it a requirement of ERISA to pay contractual obligations. With this addition, Congress made it possible for trust funds to sue under Section 502 and to seek mandatory prejudgment interest, attorney fees and liquidated damages. Section 515 provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

The key phrase in Section 515 for purposes of this case is "under the terms of a collectively bargained agreement" because it clearly and unambiguously describes the source of the employer's ERISA obligation: the contractual promise to pay. Since the present case involves an obligation which is not contractual in nature, it falls outside of the scope of Section 515 and outside the jurisdictional grant of Section 502. The Funds, nonetheless, attempt to persuade the Court that the phrase "under the terms of a collectively bargained agreement" was intended to include legal duties imposed by the NLRB's interpre-

tation of Section 8(a)(5). The Funds' interpretation cannot succeed since on its face, Section 515 makes no reference to legal duties imposed by applicable labor-management relations law and speaks solely in terms of obligations arising out of contract.

As part of the same amendments that added Sections 515 and 502(g), Congress used language that clearly demonstrates that it appreciated the difference between contractual obligations and legal duties arising out of the NLRA and that it chose to limit the application of Section 515 to contractual obligations.[4] In the withdrawal liability sections of MPPAA, Congress drafted Section 4212 to make separate reference to obligations arising by virtue of a collective bargaining agreement and to obligations arising under applicable labor-management relations law. Section 4212 states:

> *For purposes of this part,* the term "obligation to contribute" means an obligation to contribute arising—
>
> (1) under one or more collective bargaining (or related) agreements, or
>
> (2) as a result of a duty under applicable labor-management relations law,

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[4] Sections 502 and 515 were added to ERISA as part of MPPAA. The main focus of MPPAA was employer withdrawal from multiemployer pension plans. Congress felt the preexisting law to be unfair because it typically allowed employers to withdraw from plans without liability for unfunded vested pension benefits and left those employers remaining in the plan liable for a larger proportionate share of those unfunded benefits. Accordingly, MPPAA amended ERISA to require all withdrawing employers to pay their fair share of the Plan's unfunded vested liability. Under MPPAA, a complete withdrawal occurs when an employer permanently ceases having an "obligation to contribute" to a plan. *See* ERISA, Section 4203(a), 29 U.S.C. 1383(a).

but does not include an obligation to pay withdrawal liability under this section or to pay *delinquent contributions*. (emphasis added)

By identifying both sources of obligation in Section 4212, Congress demonstrated that it appreciated the distinction between them. But Congress drafted this two-pronged definition to apply *only* to determinations of whether an employer has withdrawn from a plan. Nothing in the language of Section 4212 or Section 515 indicates that this definition applies to actions for delinquent contributions. In fact, the plain language of the statute says just the opposite.[5]

Where Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposefully in that disparate inclusion or exclusion. *Rodriguez v. United States*, 480 U.S. — (1987) (per curiam) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). This general presumption is particularly weighty in the instant case since Sections 515 and 4212 were enacted as parts of the same legislation and Congress expressly limited Section 4212's application to determinations of if and when a withdrawal occurs.

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[5] Interestingly, if the reference in Section 515 to a collective bargaining agreement were read as incorporating the definition from Section 4212, the Funds would actually be barred from collecting any delinquent contributions. Section 4212 expressly provides that the obligation to contribute "does not include an obligation . . . to pay delinquent contributions." Thus, it is nonsensical to argue that Section 515—intended to enable funds to collect delinquent contributions—incorporates a definition of the obligation to contribute which *excludes* delinquent contributions.

The limitations built into Section 4212 and the plain language of Section 515 should make it impossible for the court to conclude that the phrase "under the terms of a collective bargaining agreement" in Section 515 includes the separate obligation to contribute "under applicable labor-management relations law." If the language of Section 515 does not include applicable labor-management relations law, the Funds cannot prevail. Necessity being the mother of invention, the Funds nevertheless insist that Congress intended in Section 515 to refer to both prongs of Section 4212. They attempt to achieve that objective by focusing on Section 515's use of the phrase under "the terms of" a collective bargaining agreement and argue that this oblique phrase is a cryptic reference to duties arising under applicable labor-management relations law.[6]

The Funds' reading of Section 515 is unacceptable. Common sense and the plain wording of ERISA tells us that had Congress intended a radical departure from the exclusive jurisdiction of the NLRB it would have said so. Yet, nothing in Section 515 or any other section of MPPAA suggests that Congress intended this meaning or that Congress implicitly repealed or encroached upon the NLRB's exclusive jurisdiction over post-contract expiration unfair labor practices. As this Court stated in *Kaiser Steel Corporation v. Mullins*, 455 U.S. 72, 88 (1982) "'[r]epeals by implication are disfavored,' *Allen v. Mc-*

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[6] Section 515 also says under "the terms of" the *plan*, but the Funds do not urge that this is a cryptic reference to labor-management relations law. The Funds do not explain how the phrase "the terms of" can change its meaning within the same sentence.

Curry, 449 U.S. 90, 99 (1980). [Thus] 'the intention of the legislature to repeal must be clear and manifest.' " *See* also ERISA Section 514(d), 29 U.S.C. 1144(d) ("nothing in this title shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States . . . or any rule or regulation issued under any such law.").

Here the Congress' alleged intent to repeal the NLRB's exclusive jurisdiction over Section 8(a)(5) violations is anything but manifest and clear. Indeed, since the NLRA, ERISA and MPPAA are such carefully crafted, excruciatingly thorough, detailed and precise statutes, it boggles the imagination to suggest that Congress left the meaning of Section 515 to be conveyed by an obscure and implausible reading of a trivial phrase—"the terms of". Every court of appeals that has considered that suggestion has rejected it.[7] Section 515 applies to exactly what Congress said it applies to—contributions owed under a collective bargaining agreement—nothing else.

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[7] The First, Third and Fifth Circuits have all reached the same result in similar cases, *New Bedford Fishermen's Welfare Fund v. Baltic Enterprises, Inc.*, 813 F.2d 503 (1st Cir. 1987); *Moldovan v. Great Atlantic & Pacific Tea Company, Inc.*, 790 F.2d 894 (3d Cir. 1986), *petitions for cert. filed*, 55 U.S.L.W. 3127 (U.S. Aug. 11, 1986) (Nos. 86-203 and 86-208); *U.A. 198 Health & Welfare, Education & Pension Funds v. Rester Refrigeration Service, Inc.*, 790 F.2d 423 (5th Cir. 1986), *petition for cert. filed*, 54 U.S.L.W. 2621 (U.S. Aug. 20, 1986) (No. 86-262).

2. The Legislative History Also Establishes That Congress Intended Section 515 To Make Multiemployer Plans Whole For An Employer's Breach Of Its Contractual Obligation To Make Contributions And Was Not Intended To Encroach Upon The NLRB's Jurisdiction Over Unfair Labor Practices.

The legislative history confirms that Section 515 and Section 502(g)(2) were enacted solely to strengthen trust funds' ability to enforce employers' *contractual* obligations and to give multiemployer trust funds additional remedies where the employers did not live up to those contractual obligations. Congress was spurred to add Sections 515 and 502(g)(2) by complaints from multiemployer trust funds that employers were not complying with existing *contractual* obligations and that state court collection actions were inadequate to enforce those obligations.[8]

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[8] For example, in 1977, the Western Conference of Teamsters Pension Trust Fund presented a prepared statement addressing the problem of delinquent contributions at a Senate Oversight Hearing on ERISA. That statement makes no reference whatsoever to any problem with the remedies of the NLRA and is explicitly limited to contractual delinquencies: "The most significant, and the oldest, day-to-day problem faced by multiemployer plans is the timely collection of contributions owed the plan by employers *under the bargaining agreements they have negotiated with local unions* . . . . ERISA did not adequately address this problem, and no Federal law provides multiemployer plans with effective methods of enforcing *bargaining agreements and related plan provisions* against delinquent employers." Oversight of ERISA, 1977: Hearings on S. 2125 before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. (1977) (statement of Theodore R. Groom and T. N. McNamara, Attorneys for the Western Conference of Teamsters Pension Trust Fund) (emphasis added). In a subsequent statement, Mr. Groom wrote: "In the statement we filed with the Subcom-

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The language of present Section 515 first appeared in S. 3017, the ERISA Improvements Act of 1978, introduced by Sens. Williams and Javits on May 1, 1978. It was carried forward into S. 209, introduced by Sens. Williams and Javits on January 24, 1979. Speaking from the floor of the Senate on January 24, 1979, Sen. Williams referred to this provision as the "section requiring employers to make *agreed-upon* periodic contributions," referring to contributions required under the terms of existing labor contracts. 125 Cong. Rec. S930 (daily ed. January 29, 1979) (emphasis added). The summary and analysis of the Senate Labor Committee emphasized the collectively bargained nature of the obligation at issue: "The importance of timely receipt of *previously agreed upon* periodic contributions to a collectively bargained multiple employer plan is great. Section 516 [515] reflects the Committee's views that the *collectively bargained* obligations of an employer to contribute to such a plan merits special treatment under ERISA . . . ." Senate Comm. on Labor and Human Resources, 96th Cong., 1st Sess., The ERISA Im-

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mittee last October, we recommended several measures to better enable multiemployer plans to collect contributions owed the plan by employers *under collective bargaining agreements* negotiated with local unions and to enforce related plan provisions. We strongly support the provisions of the bill which (i) would make an employer's obligation to contribute to a collectively bargained plan an obligation enforceable under ERISA and (ii) would require courts to allow reasonable attorney's fees and costs where the plan prevails in such an enforcement action." Joint Hearings Before the Subcommittee on Labor of the Committee of Human Resources and the Subcommittee on Private Pension Plans and Employee Fringe Benefits of the Committee on Finance, U.S. Senate, 95th Cong., 2d Sess. on S.3017 (1978) (emphasis added).

provements Act of 1979: Summary and Analysis of Consideration 45 (Comm. Print 1979) (emphasis added).

Neither bill passed. However, when MPPAA was being considered as S. 1076 in the Senate Labor Committee, of which Sens. Williams and Javits were, respectively, chairman and a permanent member, the mandatory remedies (contained in Section 502(g)(2), and the ERISA cause of action in Section 515 were added to the bill. *See* comments of Senator Javits explaining that the provisions of Sections 515 and 502(g) were from legislation previously introduced—the Williams-Javits ERISA Improvements Act of 1979 (S.209).[9] 126 Cong. Rec. S20179 (daily ed. July 29, 1980). The summary and analysis of S.1076 issued by the Senate Labor Committee explains the addition of Section 515:

> Delinquencies of employers in making required contributions are a serious problem for most multiemployer plans. Failure of employers to make *promised* contributions in a timely fashion imposes a variety of costs on plans . . .
>
> Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly . . . Sound national pension policy demands that employers who *enter into*

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[9] Perhaps this explains why Section 515 utilizes the phrase "under the terms of" while Section 4212 contains no such language. Section 4212 and MPPAA's other withdrawal provisions were drafted largely by the Pension Benefit Guaranty Corporation (PBGC) [*see* 125 Cong. Rec. S9801 (daily ed. May 3, 1979)] while Sections 502(g)(2) and 515 were borrowed from prior legislation. Thus, this minor difference in wording is probably nothing more than alternative expressions by different drafters, at different times, of the same concept—an obligation to contribute under an existing collective bargaining agreement.

agreements providing for pension contributions not be permitted to repudiate their pension *promises* . . .

. . . The Bill imposes a Federal statutory duty to contribute on employers that are *already contractually obligated to make contributions* to multiemployer plans.

Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 44 (Comm. Print 1980) (emphasis added).

The legislative history shows that Section 515 and its companion, Section 502(g)(2), were intended to reach those employers who breach a contractual promise and to provide plans with stiff, certain statutory remedies. Nothing in the legislative history even remotely suggests that Section 515 was intended to give effect to an employer's *expired* promise to pay or to create an ERISA-based obligation to continue contributions *after* the promise to pay expired.

The Funds ground their claim solely upon the NLRB's interpretation of Sections 8(a)(5) and (d) of the NLRA.[10]

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[10] Section 8(d) defines the NLRA's statutory duty to bargain collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment. . . ." Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees. Unilateral changes by an employer during the course of a collective bargaining relationship concerning mandatory subjects of bargaining are normally regarded as *per se* violations of Section 8(a)(5). Accordingly, the NLRB has interpreted Section 8(a)(5) as requiring an employer to maintain the *status quo* as to wages and working conditions, even after the expiration of a collective bargaining agreement until the employer's duty to bargain is satisfied or until that duty is suspended by virtue of an impasse. *NLRB v. Katz*, 369 U.S. 736 (1962); *Peerless Roofing Co. v. NLRB*, 247 NLRB 500 (1980); *enf'd*, 641 F.2d 734 (9th Cir. 1981).

Like ERISA, the NLRA is a "comprehensive and reticulated" statute. It is designed to protect employees' rights to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining. . . ." *See* Section 7 of the NLRA, 29 U.S.C. 157. When it enacted the NLRA, Congress did not merely lay down substantive rules of law. It also created the NLRB to balance legitimate and often conflicting interests and congressionally expressed policies through its primary interpretation and application of those rules. Congress considered this primary, centralized administration essential to achieve that balance, to obtain uniform application of the NLRA's substantive rules and to avoid diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies.

Nothing in MPPAA's legislative history suggests that Section 515 was intended to upset the NLRA's delicate balance or to supplant the NLRB's exclusive jurisdiction over Section 8(a)(5). Indeed, it is remarkable that, for all of the recitation of legislative history[11] in the briefs of the

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[11] None of the cases cited in the legislative history as examples of the evil to be eliminated involved the statutory duty to contribute under Section 8(a)(5) after expiration of the labor agreement or dissatisfaction with the NLRB as a means of obtaining payment of post-contract expiration contributions. On the contrary, they all concerned extraneous matters interposed as defenses to a clear contractual obligation arising during the term of the labor agreement. In the legislative history of Section 515, Congress mentioned three cases with approval—all cases where an existing labor agreement required contributions: *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960) (employer owes contributions under labor agreement regardless of alleged set off for damages sustained by reasons of illegal strike); *Lewis v. Mill Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir. 1962) (employer

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Funds and their amici, there is no indication that trust funds were unhappy with NLRB processes. Nor is there any indication that Congress wanted employee benefit funds to be able to sidestep the exclusive process of the NLRB and to proceed directly in the federal district courts on the merits of a claim that an employer has breached its statutory duty to maintain the status quo under Section 8(a)(5). Surely if Congress had intended to strike out in such a new direction, some discussion of the change and its rationale would appear in the legislative history. But there is none.

On the contrary, the legislative history cited by the Funds repeatedly refers to enforcing the employer's promise.[12] That promise resides only in the collective bargaining agreement. After the agreement expires, there is no employer promise; there is only the mandate of federal law that the employer not unilaterally alter the terms and conditions of employment without satisfying its NLRA duty to bargain. The employer has made no promise re-

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owes contributions under labor agreement regardless of alleged failure of consideration); and *Huge v. Long's Hauling Co., Inc.*, 590 F.2d 457 (3rd Cir. 1978) (employer owes contributions under labor agreement regardless of alleged antitrust violation and unfair labor practices committed by union). Congress also expressed disapproval of two cases—both cases where plans claimed contributions under labor agreements: *Western Washington Laborers-Employers Health and Security Trust Fund v. McDowell*, 103 LRRM 2219 (W.D. Wash. 1979) (failure of union to achieve majority status relieves employer of obligation to contribute under pre-hire agreement), and the district court decision in *Washington Area Carpenters' Welfare Fund v. Overhead Door Company*, 488 F.Supp 816 (D. D.C. 1980), *rev'd*, 681 F.2d 1 (1982), *cert. denied*, 461 U.S. 926 (1983) (same).

12 Brief of Petitioners at pp. 17-18.

garding the period after the agreement expires.[13] Absent that promise, there is no cause of action under section 515 and no jurisdiction under section 502.

Utilizing a rather unique analysis of MPPAA and its legislative history, the Funds raise a number of arguments to support their overly broad reading of Section 515. First, they contend that "Congress did not intend to give the NLRB exclusive authority to press and resolve claims for delinquent contributions from an employer whose agreement has expired."[14] The proof of this, they argue, is that the Department of Labor (DOL) is expressly barred by Section 502(b)(2) from bringing collection actions under section 515 in order to protect it from undue pressure by plans to initiate collection actions against delinquent employers. They conclude that if Congress did not want the DOL to suffer these terrible pressures in enforcing ERISA, it certainly could not want the NLRB to be so beleaguered.

The fallacy of the Trust Funds' argument is that it assumes that Congress intended the NLRA and ERISA to have similar enforcement schemes and the NLRB and DOL to have similar enforcement powers and duties. That is simply not so. Very different administrative schemes were

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13 The Funds warn that a "significant gap" will exist if they have no ERISA-based cause of action to collect contributions accruing from the time a contract expires to the time a new contract is entered into or a withdrawal occurs. However, this so-called gap simply does not exist and trust funds are not left without a remedy. They are merely required to proceed through the NLRB since they are enforcing an employer's duty arising out of the NLRA.

14 Brief of Petitioners at p. 38.

created by the two statutes. On the one hand, no centralized administrative agency was envisioned or created for enforcement of ERISA. Instead, various enforcement responsibilities were parceled out to the IRS (qualified plan matters), the PBGC and the IRS (pension plan funding and termination), and the DOL (reporting and disclosure and fiduciary responsibility matters), with the balance of responsibilities left to plan fiduciaries. Thus, in enacting ERISA, Congress did not consider centralized governmental administration of the statute to be important and left enforcement of the law and protection of the private rights flowing therefrom primarily to private parties.

On the other hand, in passing the NLRA, Congress did not merely create a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. Instead, it created the NLRB and gave it the exclusive responsibility to adjudicate unfair labor practice claims. There is no undue pressure in asking the NLRB to do what it was created and statutorily mandated to do.

The Funds and the Solicitor General opine that the NLRB's limited resources and personnel may not be sufficient to handle all of the unfair labor practice charges that may be filed by trust funds over post-contract expiration contributions. They further claim that the Board's limited resources could be better used if the plans were able to submit these claims directly to the court. However, more than 50 years of experience has shown the NLRB to be well equipped to interpret and enforce the NLRA and to fashion national labor policy.

Further, even assuming that the Board's resources were for some reason insufficient to enforce these claims,

the fact remains that Congress assigned this responsibility to the NLRB and chose not to create a private right of action for unfair labor practices. *Cement Masons Health & Welfare Trust Fund v. Kirkwood-Bly, Inc.*, 520 F.Supp. 942, 943 (N.D.Cal. 1981), *aff'd* 629 F.2d 641 (9th Cir. 1982). Thus, "the dispositive question" is not whether a private right of action is desirable but "whether Congress intended to create any such remedy. Having answered that question in the negative, [the court's] inquiry is at an end." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979). Accordingly, arguments concerning the Board's limited resources and the desirability of a right of action are best directed to Congress and not to the Court. *See, Touche Ross & Co. v. Redington*, 442 U.S. 560, 579 (1979) ("If there is to be a federal damage remedy under these circumstances, Congress must provide it. '[I]t is not for us to fill any hiatus Congress has left in this area . . .' "); *see also, Taylor v. Brighton Corp.*, 616 F.2d 256, 264 (6th Cir. 1980).

As a final argument, the Funds note that, before MPPAA, employee benefit funds already had a cause of action under Section 301 of the Labor-Management Relations Act to collect delinquent contributions under an existing labor agreement. They reason that if Section 515 of ERISA is limited to contributions due under an existing labor agreement, then it is merely duplicative of Section 301 of the LMRA. From this, they conclude that Congress evidently intended to arm employee benefit plans with a potent new weapon that permits them to bypass the NLRB.

Again, however, this argument conveniently ignores the specific purpose of Section 515. As noted previously,

Sections 515 and 502(g) were enacted to give effect to an employer's contractual promise to make contributions and to give plans added remedies when employers breach that promise. Section 515 creates an ERISA-based right to contractually mandated contributions independent of Section 301 and acts as a springboard into the new provisions of Section 502(g) for mandatory prejudgment interest, mandatory attorney fees and costs, and the other mandatory relief described in the statute. These remedies are the potent new weapon previously unavailable to plans under Section 301 that Congress provided in MPPAA, and Section 515 was the technical change necessary for the funds to take advantage of them.

Section 515 also enlarged on the cause of action under Section 301 by including a cause of action for breach of the terms of the plan itself. As the representatives of the Western Conference of Teamsters Pension Trust Fund noted in their statement in the 1977 Oversight Hearings, lawsuits under Section 301 of the LMRA enabled funds to collect the delinquent contributions due under the labor agreement but would not always permit the funds to collect other items of damages provided in the plan document, such as attorney fees or liquidated damages. Section 515 expanded on the pre-existing cause of action by permitting funds to enforce *plan* provisions beyond the basic contribution specified in the labor agreement.

While Section 502 suits provide relief very different from that available in Section 301 actions, Sections 502 and 301 are both intended to give effect to contractual rights and should, therefore, be applied in a similar fashion for the purpose of determining jurisdiction. *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. — (1987);

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. — (1987), 107 S.Ct. 1549 (1987). It is well established that after a collective bargaining agreement expires, the parties' rights, duties and obligations are determined by the NLRA and not by their expired contract. Thus, claims based solely on an employer's unilateral change in working conditions fall within the exclusive jurisdiction of the NLRB and federal courts are without Section 301 jurisdiction over those disputes. *Cement Masons Health and Welfare Trust Funds v. Kirkwood-Bly, Inc., supra.* Since Congress intended Section 502 jurisdiction to be treated in a similar fashion, a similar result should obtain. Like Section 301, Sections 502 and 515 do not give federal courts jurisdiction over claims for post-expiration contributions that arise solely under Section 8(a)(5).[15]

B. Requiring Plans To Resort To The NLRB Will Not Harm Plans Or Cause Trustees To Breach Their Fiduciary Duties.

There is no question that Congress intended to afford certain rights and protections to plans when it enacted ERISA. It is also undisputed that MPPAA was intended to protect the financial health of multiemployer pension plans by imposing liability on withdrawing employers. However, recognizing that Section 515 was not intended to reach claims for post-contract expiration contributions does not interfere with the statutory protections of

[15] This situation is not to be confused with Section 301 contract actions that involve breaches of collective bargaining agreements *and* conduct constituting unfair labor practices. There, the Court has allowed concurrent jurisdiction in the NLRB and the courts. *Smith v. Evening News Ass'n,* 371 U.S. 195 (1962). Here, however, there is no coexisting contract or contract obligation. The Funds' claims are based solely on the NLRA. Those claims may be asserted only before the NLRB.

ERISA. If plans have no statutory right under Section 515 to such contributions and must rely on duties and obligations arising solely out of Section 8(a)(5), then plans do not actually seek the protections of ERISA but assert an employer's duty arising out of the NLRA as interpreted and applied by the NLRB. In other words, it is the source of the right plans seek to enforce, and not their status as plans, that determines what law applies and which forum has the power to enforce it.

The NLRA was enacted to give effect to the collective bargaining process as a means of achieving industrial peace. That is why employers are not permitted to make unilateral changes in working conditions before they satisfy their statutory duty to bargain. Plans are beneficiaries of the collective bargaining process since it is typically through that process and resulting collective bargaining agreements that plans come into being and derive their funding. Plans, therefore, have a legitimate stake in having an employer comply with its bargaining obligations and may act to protect their interests like any other charging party under the NLRA. *NLRB v. Indiana & Michigan Electric Company,* 318 U.S. 9 (1943) ("[S]trangers to the labor contract [are] . . . permitted to make the charge. The charge is not proof. It merely sets in motion the machinery of an inquiry."); *see also* 29 U.S.C. 160(b), and 29 C.F.R. 102.9 (1981). However, nothing in the NLRA entitles plans to special treatment or status. Their right to seek redress for an unfair labor practice and their right to relief under the Act is the same

as any party affected by an employer's unfair labor practice. Treating plans as normal charging parties permits them to enforce Section 8(a)(5) and effectuates the purposes and policies of the NLRA.

The Funds argue that should the Court recognize the NLRB's exclusive jurisdiction over contribution obligations arising from Section 8(a)(5), funds will be denied the remedies provided under Section 502(g)(2) of ERISA. But the Funds erroneously assume that plans are entitled to Section 502 relief under such circumstances. They are not. An 8(a)(5) violation is a violation of the NLRA and plans are not entitled to Section 502 relief merely because an employer violates its statutory duty to bargain. It is the Board's responsibility to fashion remedies for unfair labor practices that will effectuate the purposes and policies of the Act. If the Board deems it appropriate to award lost return on investment, additional administrative costs, liquidated damages and attorney's fees for an employer's 8(a)(5) violation, then it will make such an award.[16]

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[16] ERISA Sections 515 and 502 and NLRA Section 8(a)(5) are directed to two entirely different evils. In enacting Section 515, Congress had in mind routine collection actions where the employer had no valid defense but chose to put the fund through a lawsuit simply as a device for delay or compromise. Section 502 relief was intended to discourage such devices by assuring that the employer has nothing to gain—and much to lose—by forcing the fund to litigation. On the other hand, Section 8(a)(5) violations are not such open and shut cases. Unlike mere collection actions, a Section 8(a)(5) case typically involves difficult issues of fact and complex legal issues that go to the heart of a carefully balanced labor-management relationship. Thus, in the 8(a)(5) context, employers are more likely to have legitimate defenses to liability that are asserted in good faith and not for the purpose of delay or compromise.

The Funds assume that the NLRB is without the statutory authority to grant such relief. This assertion ignores the broad remedial powers vested in the NLRB under Section 10(c) of the NLRA which, in pertinent part, allows the Board to fashion both affirmative and injunctive remedies. The Board was given such broad powers to fulfill its obligation to effectuate national labor policy. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 215-216 (1964).

As this Court stated in *Fibreboard*, where the Board finds that an unfair labor practice has been committed, Section 10(c) provides that it shall " 'issue . . . an order . . . as will effectuate the policies of this Act. . . .' " *Id.* at 215. Citing several of its earlier cases, the Court went on to say at p. 216:

> The Board's power is a broad discretionary one, subject to limited judicial review. Ibid. "[T]he relation of remedy to policy is peculiarly a matter for administrative competence. . . ." [citation omitted] "In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience." [citation omitted]. The Board's order will not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."

The Court affirmed the NLRB's order based on the fact that "[t]here has been no showing that the Board's order restoring the *status quo ante* was not well designed to promote the policies of the Act." *Ibid.*[17]

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[17] By requiring an employer to return to the *status quo ante* the NLRB does not give effect to the expired contract, but en-

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The NLRB has repeatedly used its power to fashion appropriate remedies where it found that unilateral changes, including the cessation of fringe benefit or pension fund contributions, were made in violation of Section 8(a)(5). For example, in *Stone Boat Yard and United Brotherhood of Carpenters and Joiners of America, Local 1149, AFL-CIO,* 264 NLRB 981 (1983) *enf'd sub nom. Stone Boat Yard v. NLRB,* 715 F.2d 441 (9th Cir. 1983), *cert. den.,* 446 U.S. 937 (1984), which was decided well after Sections 515 and 502 were added to ERISA, the Board concluded that the employer committed an unfair labor practice under Section 8(a)(5) by stopping payments to union fringe benefit and pension plans following the expiration of a collective bargaining agreement. The Board ordered the employer to resume making contributions, to pay contributions owed from the time the collective bargaining agreement expired, and to make employees whole, including interest for any losses or expenses they incurred due to the employer's cessation of payments to the plans. In 264 NLRB at 983, n.6, the Board also left open the possibility for additional remedies bearing a striking resemblance to those available under Section 502(g)(2):

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forces the employer's duty to bargain in good faith before implementing change. Thus, the Board forces an employer to maintain the wages, hours and other terms and conditions of employment in effect at the time of contract expiration. The Board also requires the employer to continue certain employment practices that were not in the contract, but are nonetheless part of the employment relationship. However, it does *not* require the continuation of employment terms which exist solely by virtue of the contract. Such "contract" terms include union security, dues checkoff and arbitration. *Industrial Union of Marine & Shipbuilding Workers v. NLRB,* 320 F.2d 615, 619-620 (3rd Cir. 1963).

Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of the proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question whether Respondent [the employer] must pay any additional amounts into benefit funds in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the funds at issue, and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses.

Cases like *Stone Boat Yard* make it clear that the NLRB *can* and, in appropriate circumstances, will award relief like that available under Section 502(g)(2).[18] *See e.g. G.T. Knight Company, Incorporated*, 268 NLRB 468, 469-70 (1984); *Samuel Kosoff & Sons, Inc.*, 269 NLRB 424, 430-31 (1984); *Advanced Installations, Inc.*, 268 NLRB 640, 641 n.11 (1984). If Section 502(g)(2) remedies have been incorporated into a trust agreement, the Board need

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[18] In a subsequent backpay proceeding, the NLRB directed Stone Boat Yard to pay liquidated damages to the trust funds based upon the trust funds' loss of the investment return on the funds withheld by the employer. *Stone Boat Yard*, 276 NLRB 1185, 1189 (1985). *See also Merryweather Optical Co.*, 240 NLRB 1213, 1216 n.7 (1979) ("These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses.").

only refer to that agreement to fashion appropriate relief.[19] If such remedies have not been incorporated, a fund need only show the loss that it has sustained as a result of the 8(a)(5) violation. That proof is in the trustees' hands since the actual amount of contributions owed can be calculated from the agreement, the trusts' investment manager or actuary can calculate any investment loss[20] and the trustees will have bills for collection costs, presumably including attorney's fees. Thus, the Funds' claim that the NLRB cannot give an adequate remedy is simply not so and must be rejected.

Further, post-contractual contributions represent but a very small, isolated and insignificant source of plan funding. Yet the Funds try to build this molehill into a mountain by complaining that if forced to resort to the NLRB they will be left liable for benefits for which they have received no corresponding contributions. These assertions are nonsense. ERISA does nothing more than require defined benefit pension plans to pay the benefits promised

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[19] Indeed, this may be the best way for drafters of multi-employer plans and trust agreements to be assured that parties to them will know the cost of a wrongful cessation of contributions.

[20] Since the double interest or liquated damages portion of Section 502(g)(2) was included to help funds recover investment losses, that part of the remedy is presumably included in the *Stone Boat Yard* calculation. The subsequent order awarding liquidated damages confirms this.

under the plan document.[21] Here, only two of the Funds are pension plans and nothing suggests that they are defined benefit plans. Further, the Funds operate from the mistaken assumption that they have an absolute right to these contributions when in fact their entitlement is contingent upon a finding that an employer has violated a duty under the NLRA as interpreted by the NLRB. The benefits promised by a plan are purely a question of plan design for which the trustees alone are responsible. The trustees' economic policy decision to promise benefits based on service for which they are not certain of receiving contributions is solely the trustees' responsibility.[22]

The Funds also complain that forcing them to resort to the NLRB places the trustees in jeopardy of violating their fiduciary responsibilities under ERISA.[23] This is

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[21] In a "defined benefit" pension plan an employee's pension is not calculated directly on the basis of the contributions made for him by his employer, but on a formula using, for example, a participant's age, service and rate of pay at retirement.

[22] The Funds' argument is really a tempest in a teapot. All the DOL has said is that if a plan promises benefits, they must be paid. If an employer has no duty to make contributions, then the trustees must otherwise plan for an adequate source of funding to cover the plan's promise. There are many instances —such as when an employee works overtime hours for which an employer is not required to pay contributions under the collective bargaining agreement—in which plans grant service credit not matched by contributions. These liabilities are merely factored into the overall equation of assets and liabilities when the plan's actuary sets the plan's promised level of benefits.

[23] This argument also overlooks the fact that unions stand in a fiduciary relation to their members, yet unions are limited to filing unfair labor practice charges with the NLRB to protect their members from violations of Section 8(a)(5). Note, *Two-Tier Wage Discrimination and the Duty of Fair Representation*, 98 Harv. L.Rev. 631, 643, n. 62 (1985); Rosen, *Fair Representation,*

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not so. Under ERISA, trustees must "discharge [their] duties . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." ERISA Section 404, 29 U.S.C. 1104.

ERISA does not require trustees to achieve success in collection actions. Trustees are not guarantors of contributions. Rather, ERISA merely requires trustees to act in a prudent manner and to seek delinquent contributions in conformance with the law. Where, as here, funds seek contributions based solely upon the employers' unilateral action in alleged violation of Section 8(a)(5), the funds' unfair labor practices claims may be pursued only before the NLRB. Thus, requiring plan trustees to resort to the Board for such post-expiration contributions is consistent with the law and would satisfy the trustees' fiduciary responsibilities as a matter of law.[24]

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Contract Breach and Fiduciary Obligations: Unions, Union Officials and the Worker in Collective Bargaining, 15 Hastings L.J. 391, 396 (1964) and cases cited therein. To the best of our knowledge, no court has ever held that the exclusivity of the remedy prevents union officials from discharging their fiduciary duties to their members. To the contrary, this Court has upheld the exclusivity of the remedy over a dissent that raised the fiduciary argument. *Amalgamated Assoc. of Street, Electric Railway & Motor Coach Employees of America v. Lockridge,* 403 U.S. 274 (1971). There is no reason why trust funds should be accorded different or preferential treatment.

[24] *Cf.* Prohibited Transaction Class Exemption 76-1, 41 Fed. Reg. 12740 (1976) (no prohibited transaction with regard to delinquent contributions as long as the plan makes "such reasonable, diligent and systematic efforts as are appropriate under the circumstances to collect such contributions").

The Trust Funds also complain that having to bring delinquency actions before the NLRB is unfair because they may not know a delinquency exists within the NLRA's six-month statute of limitations for bringing unfair labor practices, and may breach their fiduciary duties by failing to initiate unfair labor practice procedures in a timely fashion. However, funds must surely be able to keep track of whether contributions are being made by a covered employer.[25] If not, then plan participants are better served by the six-month statute of limitations since plan fiduciaries will be forced to fulfill their duties in a timely manner. Requiring plans to file charges within the NLRB's shorter statute of limitations will also effectuate the purposes of ERISA by avoiding the loss caused by prolonged delinquencies.

The Court has recognized the importance of resolving disputes concerning breach of fiduciary duties in accordance with Section 10(b) of the NLRA.[26] In the context of

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[25] Most employers pay pension and welfare benefit plan contributions monthly. Welfare plan contributions usually are then disbursed from funds in the same month as benefits or premiums for group health, disability, or life insurance contracts. Here, the Funds are no exception to that common practice. They received contributions on a monthly basis. Moreover, it cannot be argued that the Funds were unaware of Advanced Lightweight's post-expiration cessation of contributions within this six-month period since the Funds initiated their suits six months *and one day* after expiration of the union contracts. Perhaps this is merely a coincidence. However, a more likely explanation is that the Trust Funds purposefully allowed this six-month period to run in order to avoid the NLRB's administrative processes. If that is the case, then the Funds cannot complain about the NLRA's six-month statute of limitations.

[26] Section 10(b) provides, in pertinent part: "[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board. . . ." 29 U.S.C. 160(b).

suits under Section 301 for breach of a union's duty of fair representation, the court adopted the six-month statute of limitations provided by the NLRA. *Del Costello v. Teamsters,* 462 U.S. 151 (1983). The rationale for adopting the statute of limitations applicable to unfair labor practice charges was that allegations of fiduciary breach should be resolved in as quick and uniform a manner as possible. The Court stated:

> "[T]he need for uniformity" among procedures followed for similar claims . . . as well as the clear congressional indication of the proper balance between [bargaining relationships and finality of private settlements, and employees' interests in remedying unfair treatment under the collective bargaining system] counsels the adoption of 10(b) of the NLRA as the appropriate limitations period for lawsuits such as this.

Id. at 171.

The Court also noted that "it is of the utmost importance that the law reflect the realities of industrial life and the nature of the collective bargaining process." *Id.* at 172. There is no reason why this rationale does not apply with equal force to participants and plans asserting claims arising solely out of the NLRA.

C. Allowing District Courts To Decide Section 8(a)(5) Issues Would Do Serious Harm To The NLRA's Comprehensive Scheme And Frustrate The Purposes Underlying Section 515.

The Funds' claims are grounded solely upon an employer's statutory bargaining duty arising out of the National Labor Relations Act. When Congress passed that statute, it created a comprehensive scheme for the central-

ized administration and uniform application of the NLRA's substantive rules. It assigned primary application of these substantive rules to the National Labor Relations Board. Congress sought to create in the Board an agency which could, through its experience and expertise, fashion and effectuate national labor policy consonant with the policies and purposes of the NLRA. Congress also expected the NLRB to utilize its experience and expertise when making factual findings in this specialized field of knowledge. Courts do not possess and cannot be expected to possess the same experience and expertise. Thus, under the NLRA, it is for the Board to strike an appropriate balance between conflicting congressional policies and other legitimate interests and to apply its decision to effectuate the purposes and policies of the NLRA. Likewise, under the NLRA the Board acts as the initial fact-finder in unfair labor practice proceedings and the courts are directed to accept those factual findings as final and binding provided they are supported by substantial evidence. *See* NLRA Section 10(e), 29 U.S.C. 160(e) ("[t]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.")

Allowing funds or plans to sue over contributions allegedly due under Section 8(a)(5) of the NLRA would defeat Congress' statutory plan and create the very diversities and conflicts Congress sought to avoid when it created the NLRB. It would also inject uncertainty and permit undue judicial interference in the collective bargaining arena. The arguments to support this point are well presented by the briefs amici curiae of the Chamber of Commerce of the United States and the Associated General

Contractors of America, Inc. and need not be repeated except to emphasize one important point. This case poses difficult issues of fact and complex questions of federal labor law requiring the Board's initial interpretation. For example, the parties disagree on whether Advanced Lightweight and the Unions were at a bargaining impasse. Whether or not a bargaining impasse exists is a highly sophisticated and difficult issue best directed to the NLRB. As noted by the NLRB, "[w]hether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations, are all relevant factors to be considered in deciding whether an impasse in bargaining exist[s]." *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *aff'd sub nom. AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). These are all factors which only the Board can properly consider and weigh in the first instance for the purpose of determining an unfair labor practice.

Further, factual and legal issues exist concerning the unions' waiver of bargaining rights and their failure to satisfy their statutory bargaining obligations under Section 8(b)(3)[27] of the NLRA. If either of Advanced Lightweight's positions are correct, then it was entitled to make unilateral changes and to cease trust fund contributions,

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27 Section 8(b)(3), 29 U.S.C. 158(b)(3) provides that:

"It shall be an unfair labor practice for a labor organization or its agents—

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a) . . . ."

even in the absence of an impasse. These defenses pose difficult factual and at least one legal labor policy issue of first impression which must be addressed by the NLRB[28] and not by the court.[29]

The Funds argue that federal courts should be allowed to decide Section 8(a)(5) violations in collection actions under Section 515 because they are allowed to decide such questions in withdrawal liability actions. But the Funds are wrong: the withdrawal liability provisions of ERISA do *not* license the district courts to decide Section 8(a)(5) violations. Withdrawal liability actions do not present any question of violation of Section 8(a)(5) and, unlike claims

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28 While the NLRB has developed a body of decisional law concerning a union's waiver of bargaining rights, it appears never to have decided whether or not an employer may make post-contract expiration unilateral changes in working conditions where a union fails to satisfy its statutory duty to bargain and thus precludes the parties from reaching a bona fide bargaining impasse. Thus, even assuming that the district courts do have jurisdiction over Section 8(a)(5) claims under ERISA Section 502, they still would not have NLRB case law from which to draw in order to determine the parties' substantive rights, duties and obligations. Such issues of first impression should be left for initial decision by the NLRB.

29 A serious question also exists as to whether or not these various defenses could be raised in a district court action. The court has held that union unfair labor practices may generally not be raised as defenses in federal contract actions. *See Kaiser Steel Corp. v. Mullins, supra* at p. 81; *Waggoner v. R. McGray, Inc.*, 607 F.2d 1229, 1235 (9th Cir. 1979). Thus, sending these Section 8(a)(5) claims to district court may create the anomalous situation of trust funds being able to assert rights and duties arising under the National Labor Relations Act but employers being precluded from asserting the unions' breach of its statutory duty as a defense. Denial of such defenses would raise issues of constitutional proportions concerning due process. Those issues may be avoided by placing both statutory claims under Section 8(a)(5) and defenses to them solely before the NLRB.

of violation of Section 8(a)(5) in a collection context, could not be brought before the NLRB in any event.

The Funds' argument overlooks the essential distinction between collection actions and withdrawal liability actions. In a post-expiration collection action, a plan claims that the obligation to contribute *continues* under Section 8 (a)(5) of the NLRA and that the employer is in *violation* of that statutory obligation. In essence, the plan charges the employer with an unfair labor practice, over which the NLRB has exclusive jurisdiction.

By contrast, in a withdrawal liability action, the plan claims that the obligation to contribute has *permanently ceased.*[30] Even if true, this claim by the plan does not constitute an unfair labor practice by the employer. The NLRB would have no jurisdiction over such a claim, since no one is charged with violating the NLRA. Even if there is a contest over when the obligation ceased, there still is no claim that Section 8(a)(5) has been violated and therefore no NLRB jurisdiction at all.[31]

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30 A permanent cessation of the obligation to contribute is not necessarily synonymous with an impasse, nor does an impasse relieve the employer of its statutory duty to bargain. *Plymouth Locomotive Works, Inc.*, 261 NLRB 595 (1982); *Flex Plastics, Inc.*, 262 NLRB 651 (1982), *enf'd*, 726 F.2d 272 (6th Cir. 1984). At most, an impasse only *temporarily* suspends the duty to bargain and can be broken at any time by a material change in circumstances. *Gulf States Manufacturing, Inc. v. NLRB*, 704 F.2d 1390 (5th Cir. 1983).

31 The only two cases cited by the Funds on this point are contests over when the obligation ceased. *Woodward Sand Company, Inc. v. Western Conference of Teamsters Pension Trust Fund*, 789 F.2d 691 (9th Cir. 1986), and *I.A.M. National Pension Fund v. Schulze Tool and Die Co., Inc.*, 564 F. Supp.

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Giving federal courts jurisdiction over withdrawal liability actions, therefore, provides the *only* forum in which such issues can be resolved and does not invade the exclusive jurisdiction of the NLRB to adjudicate claims of unfair labor practices. The issues presented to the federal court in a withdrawal liability case may bear some resemblance to issues decided by the NLRB in unfair labor practice charges,[32] but the fact remains that nothing in MPPAA

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1285 (N.D. Cal. 1983). It is noteworthy that neither case presented a claim that the employer had violated Section 8(a)(5) of the NLRA and, therefore, neither case could have been brought before the NLRB. In addition, both of those cases are historical anomalies. The issue over when the obligation to contribute ceased arose only because the labor disputes in those cases straddled the effective date of MPPAA. The plans sought to place the cessation on a date after MPPAA took effect, and the employers sought to place it on a date before MPPAA took effect, thereby relieving themselves of liability. Needless to say, that fact pattern will never recur.

[32] The funds are simply wrong when they assert that withdrawal liability cases necessarily involve determination of the issue of impasse. Under MPPAA, the mere existence of a "labor dispute" under Section 4218 is sufficient to prevent a withdrawal. Thus, withdrawal liability disputes in the context of a labor dispute require the court to decide *only* whether a labor dispute exists, not the subtle question of whether and when an impasse was reached. *Marvin Hayes Lines, Inc. v. Central States Pension Fund,* 6 Employee Benefits Cases (BNA) 2375 (M.D. Tenn. 1985); *T.I.M.E.-DC, Inc. v. IAM National Pension Fund,* 597 F. Supp. 256 (D.D.C. 1984) (finding the existence of a labor dispute and concluding that the existence of a labor dispute does not depend on the existence or absence of an impasse); *T.I.M.E.-DC, Inc. v. New York State Teamsters Conference Pension and Retirement Fund,* 580 F. Supp. 621, 629 (N.D.N.Y. 1984) ("[the plan] suggests that an impasse will trigger withdrawal liability. In fact, the concept of impasse is wholly irrelevant to the issues here. As merely a stage in the labor dispute, there is simply no talismanic significance of the presence of an 'impasse'. (footnotes omitted)"); *T.I.M.E.-DC, Inc. v. Trucking Employees of North Jersey Welfare Fund, Inc.,* 560 F. Supp. 294 (E.D.N.Y. 1983).

—including the withdrawal liability provisions—gives federal courts jurisdiction over any claim of violation of the NLRA.

Authorizing the district courts to decide Section 8(a)(5) claims under Section 515 would also frustrate the purpose underlying ERISA's Sections 502(g) and 515. The legislative history cited by the Funds makes repeated reference to Section 515's goal of eliminating "lengthy, costly and complex litigation concerning claims and defenses unrelated to 'the employer's promise of contributions.'"[33] Clearly the obligation to maintain the *status quo* under Section 8(a)(5) of the NLRA and an employer's defenses thereto are unrelated to the employer's promise to pay. Thus, assuming that the purpose of Section 515 was to strip away such unrelated issues in collection actions brought in federal court, application of Section 8(a)(5) to such actions would reinject extraneous defenses in Section 502/515 collection actions and frustrate that legislative goal. If the purpose of Section 515 was to avoid such defenses in federal court collection actions, then that purpose also mandates that claims based upon an employer's statutory duty to maintain the *status quo* under Section 8(a)(5) be decided by the NLRB and not by the courts.

In addition, sending Section 8(a)(5) claims to district court would frustrate ERISA because it would require the needless expenditure of plan assets on uncertain claims.[34]

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[33] See Brief of Petitioners at p. 18.

[34] One issue before the Board in *Advanced Installations, Inc., supra,* was whether the cessation of payments to several differ-

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The NLRB's processes are impartial, efficient and, most importantly, free. Although funds have ample opportunity to participate in NLRB processes to the extent they desire (as explained in the brief amicus curiae of the Chamber of Commerce of the United States), prosecution of unfair labor complaints before the NLRB does not require charging parties to be represented by counsel and certainly does not involve the same substantial investment of attorney's fees as court litigation. Indeed, judicial litigation costs in even a moderately complex "unfair labor practice" collection case might quickly outstrip the amount of contributions sought and result in virtually no return to the plan because the employer prevailed. In that event, participants and plans alike would be harmed and not benefited by collection actions of this type because the assets of the plan could actually be diminished by the cost of fully litigating the case in court. This, in turn, would make less money available for plan benefits. Such a result can be avoided by simply recognizing that Section 8(a)(5) claims do not belong in federal court. Rather, they are best suited to the efficient and inexpensive administrative procedures of the NLRB.

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ent benefit funds violated Section 8(a)(5). The Board noted in its Supplemental Decision and Order awarding backpay and past due contributions that "[t]he specification alleges an amount due the Carpenter Industry Advancement Fund of Southern California. The cessation of payments into such funds does not violate Sec. 8(a)(5) of the Act and a Board order requiring payments into such funds is improper." *Supra*, at p. 640, n.2. The resolution of this uncertain issue in the courts could have involved an extensive, expensive legal battle.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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